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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

GREGORY L. BAMFORD, an Individual, and
BAMFORD PARTNERSHIP, a Colorado Partnership,

Petitioners,

v.

UPPER REPUBLICAN NATURAL RESOURCES
DISTRICT, a Body Politic,

Respondent.

Petition for Writ of Certiorari to the Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

Richard A. Dudden
Padley & Dudden, P.C.
P.O. Box 60
Ogallala, NE 69153

Attorney for Petitioners

Nancie G. Marzulla*
President and Chief
Legal Counsel
DEFENDERS OF
PROPERTY RIGHTS
6235 33rd Street, N.W.
Washington, D.C. 20015
202-686-4197

*Counsel of Record

76pp

Questions Presented

1. Whether the usufructuary right in ground water is protected as property under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Whether the government must quantify the nature and extent of a ground water shortage — and particularize those findings with respect to a specific property owner's water usage — before taking an owner's property rights in the use of the ground water without just compensation.

3. Whether a taking of all usufructuary rights in ground water — thereby destroying all beneficial and productive use of the surface land — entitles the owner to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

Parties to the Action

All parties in the courts below are listed in the caption in this Court. Pursuant to Rule 29.1 of this Court, Petitioners have no parent companies nor any non-wholly owned subsidiaries.

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**Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Gregory L. Bamford and Bamford Partnership hereby petition this Court for a writ of certiorari to review the judgment in this case of the Nebraska Supreme Court or alternatively, for a remand for further proceedings in light of this Court's recent holding in *Dolan v. City of Tigard*, No. 93-518, slip op. (U.S. June 24, 1994).

OPINIONS AND ORDERS BELOW

1. The opinion of the Nebraska Supreme Court, dated March 4, 1994, is published at 512 N.W.2d 642 (Neb. 1994), and is reproduced in Appendix A.

2. The opinion of the District Court of Chase County is available as slip opinion, No. 4996, dated July 2, 1992, and is reproduced in Appendix B.

3. The cease and desist order by the Upper Republican Natural Resources District, dated March 12, 1992, is reproduced in Appendix C.

JURISDICTION

The opinion of the Nebraska Supreme Court was issued on March 4, 1994. On May 20, 1994, Justice Blackmun extended the time for filing a petition for a writ of certiorari to August 1, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Nebraska Constitution, article fifteen, section four provides that the use of water of "every natural stream within

the State of Nebraska is hereby dedicated to the people of the State of Nebraska for beneficial purposes, subject to the provision of the following sections."

Article fifteen, section six of the Nebraska Constitution states that "[t]he right to divert unappropriated water of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest."

The statutory provisions in this case are reproduced in Appendix D.

STATEMENT OF THE CASE

This case squarely presents the issue of to what extent ground water rights — and the use of land directly tied to those rights — are protected under the Fifth Amendment's mandate that "private property [not] be taken for public use, without just compensation." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987). Although this Court has held on numerous occasions that other forms of property are protected under the Fifth Amendment, this Court has never directly examined water rights under the just compensation guarantee. *See, e.g., Kaiser Aetna v. United States,* 444 U.S. 164 (1979) (right to private access of a privately-owned pond); *Hodel v. Irving,* 481 U.S. 704 (1987) (right to devise private property); *United States v. Causby,* 328 U.S. 256 (1946) (right to exclude others from air space over privately-owned land); *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984) (right to trade secrets); *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978) (right to use air rights above a privately-owned building); and *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) (right to mine subsurface coal).

Water rights are different from other forms of property in that they are usufructuary;[1] the water is publicly owned,

[1] Usufructuary rights in this instance are rights to use water as opposed

while the right to use it is allocated under a state water rights system.[2] Because water bears a unique importance to life, particularly in the West, the right to use water has been historically regulated. In recent years, this regulation has increased due to pressures caused by urbanization and larger populations as state and local governments have sought to make water available for more diverse uses and requirements.

Petitioners are not before this Court to contest whether water should be publicly owned. Moreover, Petitioners agree that water is a valuable resource which must be carefully regulated. Under all the western water systems, waste is not permitted so that water may be conserved for beneficial uses alone. That is not contested in this case either. Petitioners also agree that in the event of scarcity, there must be a system for allocating water among competing uses.

However, Petitioners assert that the right to regulate the use of even a publicly-owned resource stops at the point at which the regulations destroy private property rights:

> We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run.

United States v. Causby, 328 U.S. at 264. *See also Lucas v.*

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to claims to legal ownership of water. *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 246 (1954).

[2] Neb. Const. art. XV, § 4; Neb. Rev. Stat. § 46-657 (1988); *Luchsinger v. Loup River Public Power District*, 299 N.W. 549 (Neb. 1941); *Metropolitan Utilities District of Omaha v. Merritt Beach Co.*, 140 N.W.2d 626 (Neb. 1966); *Prather v. Eisenmann*, 261 N.W.2d 766 (Neb. 1978).

South Carolina Coastal Council, 505 U.S. ___, 112 S. Ct. 2886 (1992) (coast line publicly owned but taking of all economically beneficial and productive use of beach front land is unconstitutional) *and Kaiser Aetna*, 444 U.S. at 172, 180 (requiring public access to privately-owned pond a compensable taking even though pond is part of the "navigable waters" of the United States).

In this case, Petitioners were deprived of the full beneficial and productive use of their farm land because a state water district prohibited them from withdrawing any ground water underlying their land. The taking of the Petitioners' water rights was pursuant to a cease and desist order confirmed by a court injunction which forbade Petitioners from taking any ground water to which they were entitled. The cease and desist order was based upon a generalized regulatory scheme which made no particularized findings regarding Petitioners' proposed use of their water rights and land.

Since joining the Union, Nebraska law has held that the ability to use ground water is a protected property right. *See, e.g., Sorensen v. Lower Niobrara Natural Resources District,* 376 N.W.2d 539, 550 (Neb. 1985). The Nebraska Constitution itself recognizes waters as a protected appurtenance constituting property. Neb. Const. art. XV, § 4. Nevertheless the court below ignored the usufructuary nature of the water right and focused instead upon the fact that ground water is publicly owned.[3] Ignoring the status of the usufructuary right as property protected by the Fifth and Fourteenth

[3] *Bamford v. Upper Republican Natural Resources District,* 512 N.W.2d 642, 651-52 (Neb. 1994), *citing* Neb. Rev. Stat. § 46-657 (1988). The Nebraska Constitution also provides that the use of water of "every natural stream within the State of Nebraska is hereby dedicated to the people of the State of Nebraska for beneficial purposes, subject to the provision of the following sections." Neb. Const. art. XV, § 4. Section 6 of that Article further provides that "[t]he right to divert unappropriated waters of every natural stream for beneficial use shall never be denied

Amendments to the United States Constitution, the court below tested the validity of the regulation as applied to Petitioners under the "arbitrary and capricious" standard applicable only in cases where fundamental property rights are not at issue.

If water rights were not property rights, then the court below would have been correct in applying the rational basis standard of review with regard to Petitioners' constitutional claim. However, since water rights are in fact property rights, the court below gravely erred in not following this Court's mandate regarding the protection of private property rights.

This Court has held on numerous occasions that usufructuary or possessory rights are protected as property under the Fifth Amendment as applied through the Fourteenth Amendment. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (easements are protected as property); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (navigational servitude is protected as property); *United States v. General Motors Corp.*, 323 U.S. 373 (1944) (leaseholds are protected as property). Indeed, many states, including Nebraska where this case arises, have historically treated the right to use ground water as a property right — creating expectations in the holders of the water rights that must be respected:

> While the consent of individual officials representing the United States cannot "estop" the United States (citations omitted), it can lead to the fruition of a number of expectancies embodied in the concept of "property" — expectancies that, if sufficiently impor-

except when such denial is demanded by the public interest." In *Merritt Beach*, 140 N.W.2d at 636, the Nebraska Supreme Court declared that ground water, whether percolating or in underground streams, are "part of the waters referred to in the Constitution as a natural want."

> tant, the Government must condemn and pay for before it takes over the management of the landowner's property.

Kaiser Aetna, 444 U.S. at 179. *See also Sorensen*, 376 N.W.2d at 551.

Moreover, subjecting Petitioners' taking claim to a "rational basis" standard of review on the grounds that water is a valuable and finite commodity as the court below did, turns the purpose behind the Fifth Amendment on its head: the framers of the Constitution *intended* the just compensation clause to bar the government from stripping an individual's wealth or property because they believed that the ability to exercise control over and to own assets was the linchpin of liberty. As Justice Story wrote so eloquently, "[i]n a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." Joseph Story, *Commentary on the Constitution of the United States,* para. 1790 (1833); *see also* The Federalist No. 10 (James Madison).

By relying exclusively upon generalized governmental findings, without engaging in any attempt to quantify the nature and extent of the need or to particularize the findings with respect to the taking of Petitioners' right to use the water,[4] the court below also did not even come close to the "rough proportionality" between the regulation and the harm sought to be avoided required by the Fifth and Fourteenth Amendments when private property rights are at stake.

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[4] In 1977, the Respondents, Upper Republican Natural Resources District, ("URNRD"), designated Petitioners' land a ground water "control area." Every five years since 1977, the University of Nebraska and the Nebraska Water Resource Commission have prepared a model on which URNRD bases its allocations. The model is prepared from a study completed in the region in which the majority of the wells exist. How-

Dolan v. City of Tigard, No. 93-518, slip op. (U.S. June 24, 1994). Instead, Respondent, Upper Republican Natural Resources District ("URNRD"), has transformed by *ipse dixit* the Petitioners' private property into public property without compensation in violation of the Fifth and Fourteenth Amendments. This Court forbade exactly that type of transformation in *Lucas*. *Lucas*, 505 U.S. at ____, 112 S. Ct. at 2901.

At its core, this case tests the extent to which this Court meant what it said in *Pennsylvania Coal*, 260 U.S. at 416: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Water will always be in short supply in the West, and states will always need to rely upon some form of water control measures to ensure that legitimate needs for water will be met. But if the government can prevent a property owner from making all productive use of his land by relying exclusively upon a generalized declaration of a need for water to justify the outright denial of access to pre-existing rights to use water, then there is no meaning to the "essential nexus" requirement articulated by this Court in *Dolan* for owners of water rights. Indeed, there is no meaning to the notion that ground water is a "property right" as Nebraska law clearly holds.

Accordingly, Petitioners urge this Court to grant this Petition for review and to declare that URNRD's regulation of their property has gone so far that it must be recognized as an unconstitutional taking or alternatively, to reverse summarily the opinion below and to remand for further proceedings in

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ever, that area differs significantly from the area in which Petitioners' wells exist. Willard G. Owens, an expert witness, testified on behalf of the Petitioners at the adjudicatory hearing that the soil in the southern one-third of the district is sandier than the soil in the northern two-thirds. He further testified that amounts of ground water vary greatly from tract to tract.

light of this Court's recent holding in *Dolan.*

FACTUAL BACKGROUND

Petitioners Gregory Bamford and the Bamford Partnership own 1,576 acres of land, 1,148 acres of which are irrigated farm land in Dundy County, Nebraska.[5] Mr. Bamford and three preceding generations, dating back to the 1800's, have been farmers and landowners in a neighboring Colorado county. Petitioners' land is arid and dry and productive due only to the existence of center-pivot irrigation systems drawing water from nine wells on their land. The nine wells access water from the Ogallala Aquifer — the largest underground body of water in the United States, underlying most of the states of Nebraska, Colorado, Kansas, New Mexico, and Texas. In size the aquifer is about 174,500 square miles.[6] The Ogallala Aquifer underlies all of the area governed by URNRD; the land which is the subject matter of this litigation is under the jurisdiction of URNRD. In 1977, the Director of Water Resources for the State of Nebraska designated a ground water "control area" which includes Petitioners' land.[7] In 1988, URNRD, the governing body for the three-county control area, created by state statute in 1969, determined that each landowner would be limited to with-

[5] Petitioners have two farms, an 800-acre farm and a 776-acre farm.

[6] Ground water in the aquifer moves at a rate of one mile every seventeen years. Richard S. Harnsberger, *From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179, 183 (1973).

[7] Under Neb. Rev. Stat. § 46-658(1), the Director of Water Resources may designate an area a control area once he evaluates the hydrologic and water quality data, history, and projected future of developments and finds that "development and utilization of the ground water supply has caused or is likely to cause within the reasonably foreseeable future the existence" of either an inadequate supply of ground water to meet present or predicted future needs for beneficial use or dewatering of an aquifer

draw fifteen acre-inches of water for each acre of land owned, each year for a five-year period.[8]

By 1991, Petitioners had used all the water allotted to them for the five year allocation period, so on September 28, 1991, Petitioners sought a variance from the restrictions imposed on them. That variance was denied on January 14, 1992.[9] On March 12, 1992 URNRD issued a cease and desist order to prohibit Petitioners from withdrawing the ground water from the wells for the remainder of the five-year period. As a result of this cease and desist order, Petitioners were unable to make economically productive use of their land (the growing of irrigated crops including corn and dry edible beans) for the year of 1992.[10]

PROCEEDINGS BELOW

On March 26, 1992, Petitioners filed a petition in district court seeking review of the March 12, 1992 cease and desist order by the URNRD and an injunction to prevent enforcement of the order. Petitioners argued, *inter alia*, that the cease

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8 Once the area is designated a control area, the district must develop a plan to conserve water. The statutorily-approved means include rationing water (the primary alternative chosen by URNRD), adopting a system of rotation for use of ground water, adopting well-spacing requirements, and requiring installation of flowmeters to measure ground water withdrawal. Neb. Rev. Stat. § 46-666(1) (1988). The natural resources districts must hold public meetings to determine the types of controls used. Neb. Rev Stat. § 46-665(1) (1988). Once the natural resources district draws up a management plan for the ground water, it must be submitted to the Director for approval. The Director reviews the plan primarily to ensure that the best information available was used in preparing the plan and that the information supports the plan. Neb. Rev. Stat. § 46-673.03 (1988).

9 Petitioners were the only overusers in URNRD's jurisdiction not granted a variance.

10 Only denial of use of ground water in 1992 is at issue in this case.

and desist order constituted a taking in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution of their property right in the ground water underlying their land. Among the exhibits they submitted were thirty-eight affidavits from other farmers owning over 51,000 acres of irrigated land governed by URNRD, each stating that the URNRD allocation was insufficient to grow crops. In response, URNRD filed a counterclaim seeking an injunction enjoining the Petitioners from withdrawing ground water.

The district court denied both the review and the injunction sought by the Petitioners but granted the injunction sought by URNRD. *See Appendix B, Opinion of the District Court of Chase County.* Petitioners, again raising a federal takings claim, appealed the denial to the Nebraska Supreme Court which upheld the decisions of the district court. *See Appendix A, Opinion of the Nebraska Supreme Court.*

REASONS FOR GRANTING THE WRIT

I. This Case Involves an Important Constitutional Question That Should Be Resolved By This Court — Whether Government Must Quantify the Nature and Extent Of a Ground Water Shortage and Particularize Those Findings With Regard To a Specific Property Owner Before Taking the Owner's Right To Use Ground Water.

Water is the lifeblood of the arid West. Indeed, most land has little value in western states without water. Agriculture is particularly dependent upon access to water. This is because rainfall in much of the West is either insufficient or too unreliable to support highly productive agriculture. The impressive performance of agriculture in recent decades has been due largely to the ability of farmers to irrigate their land. As a result, "[w]ater management in the western United States differs from water management in the humid East." D.

Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, The Prospects for Accomodation*, 21 Envtl. L. 1, 4 (1991).

At issue in this case is the right to access and use water for agricultural purposes in the western state of Nebraska, where rainfall averages approximately seventeen inches per year. Petitioners in this case own 1,148 acres of irrigated farm land which depend upon center-pivot irrigation systems drawing water from nine wells on the Petitioners' land to be economically productive.[11]

Under Nebraska law, landowners overlying an aquifer have coequal rights to the water and are limited to reasonable use of the water, so long as the water is plentiful (modified American rule). Neb. Rev. Stat. § 46-656 (1988). When it is determined that the water supply is insufficient for all users, an overlying landowner is entitled to a pro-rata share of the ground water (correlative rights doctrine). *Olson v. City of Wahoo,* 248 N.W. 304, 308 (Neb. 1933); *Prather v. Eisenmann,* 261 N.W.2d 766, 771 (Neb. 1978). Under Nebraska law, the right to use water is recognized as property:

> [W]hile vested water rights may be interfered with within reasonable limits under the police power of the state to secure a proper regulation and supervision of them for the public good, any interference that limits the quantity of water or changes the date of its priority to the material injury of its holder is . . . a deprivation of a vested right.

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[11] In the instant case, Petitioners own land which has been used for agricultural purposes for decades. All the surrounding land is farmed as well. Irrigation farming has been conducted on the Petitioners' land for seventeen to eighteen years.

Enterprise Irrigation District v. Willis, 284 N.W. 326 (Neb. 1939).[12]

In 1977 the Director of Water Resources approved URNRD's declaration that the underground water supply was insufficient for all users in accordance with section 46-658 of the Nebraska Ground Water and Protection Act.[13] Pursuant

[12] *See also Sorensen*, 376 N.W.2d 539. In *Sorensen*, the Lower Niobrara Natural Resources District condemned part of the Sorensens' land in order to build wells to supply nearby towns with water However, the amount the Natural Resources District planned on withdrawing would leave the Sorensens with too little water to irrigate their farm. The Nebraska Supreme Court held that the Natural Resources District must compensate the Sorensens for damages caused by the lack of water The condemnor must compensate the overlying landowner for "all damages caused by the taking . . . including damages to the remainder and water rights appurtenant to the remainder." *Sorensen*, 376 N.W. 2d at 550.

[13] Section 46-658 permits the Director of Water Resources to designate an area a control area after the natural resources district submits a proposal to him. Subsection (1) of the section states:

> An area may be designated a control area . . . following evaluation of relevant hydrologic and water quality data, history of developments, and projection of effects of current and new development, that development and utilization of the ground water supply has caused or is likely to cause within the reasonably foreseeable future the existence of either of the following conditions:
>
> (a) An inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply; or
>
> (b) Dewatering of an aquifer, resulting in a deterioration of the quality of such ground water sufficient to make such ground water unsuitable for the present purposes for which it is being utilized.

to that "finding," URNRD set up a ground water "control area" and designated Petitioners' land as part of that area.

In 1988, pursuant to the authority delegated to the URNRD in the Nebraska Ground Water Management and Protection Act, URNRD adopted an order allocating seventy-five acre-inches[14] of ground water per irrigated acre for the five year period commencing January 1, 1988, and ending December 31, 1992. All landowners were initially allotted the same amount of water for their land irrespective of their existing uses, the type of soil on the land, or the purposes for which the water would be used.[15] In short, water was allocated pursuant to a rationing scheme in which no property rights in the ground water were recognized.

By the end of 1991, Petitioners had used up their allocation and were in fact overdrawn.[16] URNRD filed a cease and

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[14] An acre-inch is defined as "the amount of water necessary to cover an acre of land one inch deep." Neb. Rev. Stat. § 46-657 (1988).

[15] URNRD allocates water to each irrigated acre. Rules and Regulations for Groundwater Control of the Upper Republican Natural Resources District Control Area, Rule 5(a)(1) (April 15, 1991). According to Neb. Rev. Stat. § 46-673.10(1), "[i]f allocation is adopted for use of ground water for irrigation purposes in a management area, the permissible withdrawal of ground water shall be allocated equally per irrigated acre." This allocation may be altered under Neb. Rev. Stat. § 46-666(4) if uniformity would not help "carry out the intent of the Nebraska Ground Water Management and Protection Act in a reasonably effective and equitable manner." Essentially, variances may be granted if the soil, geologic, hydrologic, or other conditions differ from the norm. Ronald Milner, manager of URNRD, testified at the adjudicatory hearing that some landowners had surplus water at the end of the allocation period.

[16] Petitioners' nine wells are "pooled." Pooling combines ground water allocations for irrigated acres. It allows a landowner to withdraw excess water from some of his or her wells as long as the withdrawal from the wells as a whole does not exceed the total allocation. Petitioners' pooled wells were overdrawn by 12.79 inches.

desist order on March 12, 1992, preventing the Petitioners from withdrawing any additional ground water from any of their wells.

The Petitioners filed a separate action seeking an injunction prohibiting URNRD from enforcing its cease and desist order. URNRD counterclaimed, asking the court to enjoin Petitioners from withdrawing any more water from their wells until they were allotted more water. After a trial on the merits, the District Court for Chase County determined that the cease and desist order was properly issued and accordingly denied the Petitioners' injunction and dismissed their petition and granted the Respondent's injunction. *See Appendix B, Opinion of the District Court for Chase County.* The Nebraska Supreme Court affirmed. *See Appendix A, Opinion of the Nebraska Supreme Court.*

In rejecting Petitioners' claim, the court below erred by treating the Petitioners as if they did not possess a property right in the use of water underlying their land.

Because of this initial and fundamental error — failing to recognize the Petitioners' property right in the use of the water underlying their land — the court below refused to admit any evidence as to whether a water shortage even existed:

> At the February 11, 1992, [administrative] hearing conducted by URNRD, and also at the trial conducted by the district court with respect to the appellants' petition for injunctive relief, the appellants [Petitioners] did present evidence relating to the available supply of water in the Ogallala aquifer, from which water was being withdrawn, and the effect of such withdrawals upon other water users. However, such evidence was not relevant in this case, because the question whether conditions existed requiring the regulation of the withdrawal of ground water from the

> appellants' [Petitioners'] wells (i.e., the question whether the underground water supply was sufficient for all users) was settled when the Director of Water Resources, pursuant to § 46-658, designated a control area encompassing appellants' nine wells. That designation effectively established that the underground water supply was insufficient for all owners using that supply.

Bamford, 512 N.W.2d at 648 (emphasis added).[17]

In short, the court below upheld the denial of access to the ground water solely on the basis of the 1977 governmental finding that a ground water control area should be established. However, this Court in *Dolan* held that generalized findings are not sufficient when the denial results in the destruction of private property rights. The *Dolan* Court examined closely the type of findings which would be adequate to vitiate private property rights and rejected as inadequate similar generalized findings by the City of Tigard which were approved by the Oregon Supreme Court:

> In this case, we conclude that city's unchallenged factual findings support the dedication conditions imposed by the city. The pedestrian/bicycle pathway condition had an essential nexus to the anticipated development because as the city found in part "the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." . . . Because the development would involve covering a much larger portion of the petitioners' land with buildings and

17 See discussion of Neb. Rev. Stat. § 46-658, *supra*, n.13.

> parking, thus increasing the site's impervious area, the conditon requiring petitioners to dedicate a portion of their property for improvement of a storm drainage system also is reasonably related to the impact of the expansion of their business.

Dolan v. City of Tigard, 854 P.2d 437, 443 (Or. 1993).

The *Dolan* Court found that such findings were not sufficiently tailored to justify the taking of private property. Thus, in taking Petitioners' water rights, as was the case of taking Mrs. Dolan's property, there must be a particularized finding of how Petitioners' use of the water would affect the overall water shortage versus a generalized finding that any use of water by anyone would deplete the water supply. The court cannot, as the court below did, rely exclusively upon a generalized finding of "need" to deny all use of ground water: "'The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made . . . .'" *Dolan*, slip op. at 15, *citing with approval Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980).

It may well be that a water shortage does not in fact exist in this particular part of the state, or that conditions have changed since 1977, or that the measures instituted bear no "rough proportionality" sufficient to substantially advance the purposes of water conservation as required by *Dolan* and *Nollan*. The refusal of the court below to admit any evidence on this subject, and to rely instead exclusively upon the Director of Water Resources's designation of a water control area, falls far short of the level of judicial scrutiny demanded by the Constitution.

Moreover, the constitutionality of the water allocation to Petitioners was tested by the court below by the rational basis

standard of review. This was serious error because it did not require the government to carry the burden of proving the necessity of taking Petitioners' water rights in order to address the alleged water shortage. The burden of proof, the *Dolan* Court explained, rests on the government which must demonstrate why the taking of property is necessary to address the burdens created by the proposed use of property: "Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. . . . Here . . . the city made an adjudicative decision to condition Petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city." *Dolan*, slip op. at 16 n.8.

Under *Dolan*, at a bare minimum, the Respondent/ URNRD, bears the burden of demonstrating that the water rationing scheme that it employed was necessary because of an actual water shortage in the area where Petitioners farmed. Further, this shortage must be demonstrated by concrete findings that relate directly to that area and the impact that the Petitioners' use of the water underlying their land would have on the overall water supply.

Anything short of requiring URNRD to supply that "essential nexus" as justification for its taking of private property violates the Fifth and Fourteenth Amendments. In the absence of detailed findings of direct impacts of the Petitioners' use of ground water on the Ogallala Aquifer and direct findings supporting the existence of a genuine water shortage, the court below's opinion licenses a "runaway" method of providing ground water for all users and uses — the burden of which must be shouldered by the individual surface landowners such as Petitioners.

Thus, the decision below sets a dangerous and far-reaching precedent by allowing state water districts to eliminate a landowner's property right in the ground water underlying privately-owned land pursuant to generalized findings that

there is a need to conserve water in the state. One could hardly imagine the consequences if a district were permitted to address "homelessness" by instituting a rationing scheme that reallocated homes and apartments to people regardless of ownership. Despite the clear folly of such an approach, the Nebraska Supreme Court held that the state can destroy all property rights in water without bearing any burden of proving ownership or even the existence of a true need for those rights.

Petitioners urge this Court to grant this Petition to establish that state governments must justify the conditions of denying permission to use ground water by showing that those conditions are directly attributable to the specific impacts of the proposed use of water on the overall water supply. The government must quantify the shortage and tailor a remedy to address the problem rather than accomplishing its objectives by fiat.

II. This Court Must Also Determine Whether Regulation Of Water Can Go So Far As To Be Recognized As An Unconstitutional Taking In Violation Of The Just Compensation Clause Of The Fifth and Fourteenth Amendments.

The Nebraska Supreme Court in its decision below has sanctioned a takings standard which disregards the importance which this Court has placed upon protecting private property rights and instead treated as paramount the state's interest in allocating a scarce resource. The court below's treatment of a constitutional right in private property is contrary to decades of jurisprudence from this Court on the importance of private property rights even when achieving important social objectives: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of

paying for the change." *Pennsylvania Coal,* 260 U.S. at 416.

A. The Destruction of All Beneficial and Productive Use of Land.

Just two years ago, on June 29, 1992, this Court declared that when "a regulation that declares 'off-limits' all economically productive or beneficial use of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Lucas*, 505 U.S. at ___, 112 S. Ct. at 2901.

In *Lucas*, the property owner was unable to secure permission from the government to build two houses on lots which were zoned for single-family residential construction at the time of purchase. However, the passage of the Coastal Zone Management Act effectively operated as a ban on the building of any habitable structure on the property owner's two lots. The trial court held that the ban deprived the property owner of any "reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless" and thus was an unconstitutional taking of property.[18] *Lucas,* 505 U.S. at ___, 112 S. Ct. at 2890.

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[18] Justice Blackmun disagreed with the majority in *Lucas* as to the remaining value of the land, noting that:

> Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." (citations omitted). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. . . . Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

Lucas, 505 U.S. at ___, 112 S. Ct. at 2908 (Blackmun, J., dissenting).

This Court agreed, noting that "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas,* 505 U.S. at ___, 112 S. Ct. at 2895 (emphasis in original).

It is precisely this type of economic harm at issue in this case. The total ban on the Petitioners' ability to withdraw any ground water to irrigate their land has deprived Petitioners of all reasonable economic use of their land.[19] That taking was total, albeit temporary. *First English Evangelical Lutheran Church of Glendale*, 482 U.S. 304 (government must compensate for temporary takings). Here, as in *Lucas,* the property is owned for a specific purpose — in *Lucas,* for the purpose of building two homes, here, for the purpose of farming. Moreover, the Petitioners have owned their land since 1980-81 and it has been used for agricultural purposes since the turn of the century. Irrigation farming has been conducted on Petitioners' 776-acre farm since 1976 and on the 800-acre farm since 1977. In short, the Petitioners' core interest in their land was agriculture.

Because Petitioners had no water in 1992, they could not irrigate their crops which consist primarily of corn and dry edible beans. The notion that the state could wipe out the Petitioners' investment in their land, without thought to their economic losses, flies in the face of the rights secured by the Fifth and Fourteenth Amendments. Moreover, the *Lucas* Court expressly rejected the notion that title to land is somehow held subject to an implied limitation that the state may subsequently eliminate all of its economically valuable use as being inconsistent with the historical compact recorded in the

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[19] Dry farming is simply impracticable on the Petitioners' land where the cost of operating tractors costs more than the value of corn "dry farmed" (grown without the benefit of irrigation).

just compensation clause. *Lucas,* 505 U.S. at ___, 112 S. Ct. at 2895.

Despite the clear economic loss sustained by the Petitioners and this Court's explicit holding in *Lucas,* the court below nevertheless concluded that Petitioners were not entitled to compensation for the economic harm occasioned by the denial of access to the ground water. This is plain error which flatly conflicts with this Court's unequivocal holding in *Lucas.*

Under *Lucas,* unless the government can show that the taking of all of Petitioners' beneficial and productive use of their property was necessary to abate a public nuisance, then compensation must be paid:

> [T]o win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas.* As we have said, a "State, by *ipse dixit,* may not transform private property into public property without compensation . . . . " (citations omitted). Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing. (citations omitted)

Lucas, 505 U.S. at ___, 112 S. Ct. at 2901-02.

The Respondent in this case cannot meet this burden because it relied merely on a generalized finding for deter-

mining that rationing of the water was necessary.

B. The Taking of The Water Right

The right to use ground water is not absolute, it is subject to reasonable restrictions pursuant to the police power. Because the right to use ground water is not absolute, not every diminution in the right to withdraw ground water will be recognized as an unconstitutional taking. But when the government, through a cease and desist order, takes a landowner's entire right to use water for the ostensible public purpose of providing more water for other people or future generations, then the government has taken property for the benefit of the public and the constitutional right to just compensation is triggered.

Thus, it was plain error for the Nebraska Supreme Court to conclude that there was no violation of the Fifth Amendment takings clause in this case. The cease and desist order destroyed the Petitioners' right to make any use of the ground water underlying their land in 1992. A mere assertion that the state is acting to further a legitimate interest by allocating a scarce resource does not obviate the requirement that a state respect private property rights. Indeed, as this Court has explained on numerous occasions, the very purpose of the Fifth Amendment is to ensure that individual property owners not be singled out to bear the cost of achieving important social objectives: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

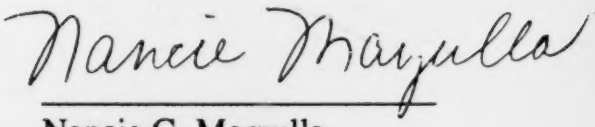
Moreover, scarcity (of a natural resource) does not relieve the government of its obligation to compensate an owner of property rights, when those rights have been taken, as they

clearly have been in this case. Although different from land, water is in fact a property right and like land, which is itself a finite resource, water use has been recognized as a property right entitled to some constitutional protection if that right is confiscated or destroyed by government action. *Sorensen*, 376 N.W.2d at 548-49. Thus, as it was with the overlying land, the destruction of the water right is total, as in *Lucas*, albeit temporary. *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 322. Thus, the government bears the burden of showing that its taking is necessary to abate a public nuisance, or else must pay compensation to the Petitioners who have been singled out to bear the burden of achieving the state's water allocation program for the good of society as a whole. *Lucas*, 505 U.S. at ___, 112 S. Ct. at 2898-99.

CONCLUSION

The Petitioners therefore urge this Court to grant the writ petitioned for in this case to establish that property rights, be they in water or in land dependent upon water for its productive and beneficial use, are entitled to protection under the Fifth and Fourteenth Amendments. Otherwise, under the court below's holding, states are free to impose any water rationing scheme they choose, even to the point that the regulation becomes a taking, without meeting even a minimal burden of proving the existence of a water shortage. Such far-reaching consequences of unlimited governmental power over individual property rights threatens life in the West far more than any water shortage.

Respectfully submitted,



Nancie G. Marzulla
Counsel of Record
Defenders of Property Rights
6235 33rd Street, N.W.
Washington, D.C. 20015
(202) 686-4197

July 29, 1994

APPENDIX A

Gregory L. Bamford et al., Appellants, v. Upper Republican Natural Resources District, a body politic, Appellee.

Nos. S-92-562, S-92-563

SUPREME COURT OF NEBRASKA

245 Neb. 299; 512 N.W.2d 642; 1994 Neb. LEXIS 54

March 4, 1994, Filed

PRIOR HISTORY: [***1]

Appeal from the District Court for Chase County: John J. Battershell, Judge. Judgment in No. S-92-562 affirmed. Appeal in No. S-92-563 dismissed.

DISPOSITION: JUDGMENT IN NO. S-92-562 AFFIRMED. APPEAL IN NO. S-92-563 DISMISSED.

HEADNOTES: 1. Injunction. Remedy by injunction is generally preventative,prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done.

2. Moot Question: Appeal and Error. There is an exception to the general rule regarding moot questions. That applies to cases involving matters of public interest. The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public

officials, and the likelihood of future recurrence of the same or a similar problem.

3. Waters. The owner of land is entitled to appropriate subterranean waters found under his land, but if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.

4. Constitutional Law: Statutes: [***2] Presumptions. It is axiomatic that statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.

5. Constitutional Law: Statutes. Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution.

6. Constitutional Law: Statutes: Proof. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.

7. Constitutional Law: Statutes: Due Process. When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement.

8. Constitutional Law: Legislature. Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists.

9. Administrative Law. Standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the

agency in the exercise of [***3] the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations.

10. Constitutional Law: Eminent Domain. There is no constitutional limitation on the right to take private property for public use under the power of eminent domain, except as to the right to just compensation.

11. Waters. Ground water, as defined in Neb. Rev. Stat. § 46-657 (Reissue 1988), is owned by the public, and the only right held by an overlying landowner is in the use of the ground water.

12. Waters. Placing limitations upon withdrawals of ground water in times of shortage is a proper exercise of the State's police power.

13. Waters. When the underground water supply is sufficient for all users, a landowner is entitled to reasonable and beneficial use of that supply.

COUNSEL: Richard A. Dudden, of Padley & Dudden, P.C., and Firmin Q. Feltz for appellants.

Terry E. Savage for appellee.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for amicus curiae Nebraska Association of Resources Districts.

JUDGES: Hastings, C.J., Boslaugh, White, Caporale, Fahrnbruch, and Lanphier, JJ., and Grant, J., Retired.

OPINION BY: BOSLAUGH

OPINION: [*301]
[**645] BOSLAUGH, J.

In these two cases which were [***4] consolidated for briefing and argument in this court, the plaintiffs-appellants, Gregory L. Bamford, Bamford Partnership, Dan Adler, and Robin Roth, sought to prevent the enforcement of a cease and desist order issued by defendant-appellee, Upper Republican Natural Resources District (URNRD). URNRD issued its cease and desist order on March 12, 1992, to prevent the appellants from withdrawing ground water from nine wells until the issuance of an additional allocation permitting further withdrawals. In response, on March 26, 1992, the appellants filed a petition in case No. S-92-562, pursuant to Neb. Rev. Stat. | 84-917 (Cum. Supp. 1992), seeking a review of URNRD's issuance of the cease and desist order. On that date, the appellants also filed a separate petition in case No. [**646] S-92-563 seeking an injunction enjoining URNRD from enforcing its March 12 cease and desist order. In its answer to the appellants' petition for injunctive relief, URNRD filed a counterclaim seeking an injunction enjoining the appellants from withdrawing ground water until the appellants' wells were granted another allocation of ground water.

Following a trial on the action for injunctive relief, the district [***5] court denied the injunction sought by the appellants and granted the injunction sought by URNRD. In addition, after a review, in accordance with | 84-917(5), of URNRD's action in issuing the March 12 cease and desist order, the district court determined that the cease and desist order was properly issued and dismissed the petition which the appellants had filed pursuant to | 84-917. The appellants now appeal the decisions of the district court.

[*302] Before reviewing the appellants' assignments of error, it is helpful to provide some minimal background. We first note that center-pivot irrigation systems have been involved in this case. Appellant Gregory Bamford is the owner of land irrigated by five wells; those five tracts or "circles" are farmed by his tenant, appellant Roth. Land irrigated by the other four wells is owned by appellant Bamford Partnership; those four circles are farmed by appellant Adler.

The land irrigated by the appellants' nine wells falls within the jurisdiction of URNRD and is within an area which, in 1977, was designated a ground water "control area." See Neb. Rev. Stat. § 46-658 (Reissue 1988). Although § 46-658(5) [***6] provides procedures for modification of a control area designation, the control area encompassing the appellants' wells remains unchanged. Consequently, the withdrawal of ground water from the appellants' wells is subject to the limitations imposed by URNRD. See Neb. Rev. Stat. § 46-666 (Reissue 1988).

In 1978, URNRD adopted rules regarding the withdrawal of ground water from wells within the district, and such withdrawals have been subject to regulation by URNRD since that time. In 1988, URNRD adopted an order allocating 75 acre-inches of ground water per irrigated acre for the 5-year period commencing January 1, 1988, and ending December 31, 1992. (Neb. Rev. Stat. § 46-657 (Reissue 1988) defines an acre-inch as "the amount of water necessary to cover an acre of land one inch deep.") Thus, in 1988 URNRD issued an allocation of 15 acre-inches per year for 5 years, but irrigators would be allowed to withdraw in excess of 15 acre-inches per year for each irrigated acre, so long as total withdrawals during the 5-year period did not exceed 75 acre-inches per irrigated acre.

In determining the total allocation available to the appellants during the 5-year period, URNRD and the appellants [***7] agreed to a "pooling" of the appellants' nine wells. Under this pooling arrangement, allocations of water which were not withdrawn from any of the nine wells could be withdrawn from any of the other nine wells. Thus, withdrawals from any single well could [*303] exceed the 75-acre-inch allocation, but total withdrawals from all nine wells could not exceed the 5-year allocation of 75 acre-inches per irrigated acre. Nevertheless, at the end of 1991, i.e., the fourth year of the allocation period, the appellants' withdrawals of ground water from the nine pooled wells had exceeded the 75-acre-inch allocation by approximately 12 acre-inches per irrigated acre. While the four wells owned by Bamford Partnership had a remaining allocation of approximately 25 acre-inches per irrigated acre at the end of 1991, the five wells owned by Gregory Bamford had exceeded their allocations by approximately 41 acre-inches per irrigated acre, thus resulting in the 12-inch "deficit" for the nine pooled wells.

Because the appellants' nine pooled wells had, at the end of 1991, withdrawn all of the ground water allocated to those wells for the 5-year period ending December 31, 1992, URNRD conducted a hearing to determine [***8] whether a cease and desist order should be issued due to the appellants' withdrawals of ground water in excess of the amount allocated. Appellant Gregory Bamford testified at this February 11, 1992, hearing. Following the hearing, URNRD issued its March 12, 1992, cease and desist order to prevent further withdrawal of ground water until the issuance of another allocation. Appellants [**647] now contend that in upholding URNRD's cease and desist order, the district court erred in (1) finding that URNRD's issuance of the cease and desist order was not arbitrary and capricious, (2) finding that the appellants' nine wells were pooled, (3) denying appellants the

right to use water underlying their land when evidence failed to show that the underground water supply was insufficient for all other water users, (4) finding that the Nebraska Ground Water Management and Protection Act was constitutional, and (5) finding that the appellants were not entitled to compensation for the taking of their property.

In reviewing the appellants' assignments of error in connection with their petitions, we first consider whether issues are presented which we may properly decide. The appellants' petitions primarily [***9] sought injunctive relief and a reversal of URNRD's issuance of the cease and desist order. However, it is apparent that the cease and desist order affected the appellants [*304] during 1992 only. The record shows that the appellants were entitled to and would have been issued an additional allocation of ground water in 1993, and statements by the appellants' counsel made during oral argument indicate that the cease and desist order was effective during 1992 only.

In *Koenig v. Southeast Community College*, 231 Neb. 923, 925-26, 438 N.W.2d 791, 794 (1989), this court stated:

At the heart of this action is the request for an injunction. The purpose of an injunction is the restraint of actions which have not yet been taken. Remedy by injunction is generally preventative, prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done. [Citations omitted.] In this case the matter is fait accompli, and the action has been taken. No court could now prohibit what has already taken place . . . . As to injunction, the case has become moot.

As in *Koenig*, issues [***10] relating only to the cease

and desist order which affected the appellants during 1992 have become moot; the matter is a fait accompli. Thus, we do not address the appellants' contention that URNRD's issuance of the cease and desist order was arbitrary and capricious. Nevertheless, we note that the evidence is uncontroverted that at the end of 1991, the fourth year of the 5-year allocation period, the appellants' withdrawals of ground water from the nine pooled wells had exceeded the amount allocated. Similarly, while the record does support the district court's determination that the nine wells were pooled, the appellants' assignment of error regarding the pooling of the nine wells is relevant only with respect to the moot issue of the propriety of URNRD's cease and desist order.

Although the passage of time has rendered moot those issues relating only to issuance of URNRD's cease and desist order, we are cognizant of additional language contained in *Koenig* which states:

> There is an exception to the general rule regarding moot questions which should be examined. That exception applies to cases involving matters of public interest. . . . The public interest exception to the rule [***11] precluding consideration of issues on appeal due to mootness requires [*305] a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Id. at 926-27, 438 N.W.2d at 795. We now address the appellants' remaining assignments of error, as those assignments of error involve matters of public interest likely to arise in future similar cases.

The appellants contend that the district court erred in deny-

ing them the right to use water underlying their land when evidence failed to show that the underground water supply was insufficient for all other water users. This contention is apparently based upon Nebraska's common law of ground water, i.e.: "'The owner of land is entitled to appropriate subterranean waters found under his land, but . . . if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . .'" *Sorensen v.* [**648] *Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 188, 376 N.W.2d 539, 546 (1985). [***12]

At the February 11, 1992, hearing conducted by URNRD, and also at the trial conducted by the district court with respect to the appellants' petition for injunctive relief, the appellants did present evidence relating to the available supply of water in the Ogallala aquifer, from which water was being withdrawn, and the effect of such withdrawals upon other water users. However, such evidence was not relevant in this case, because the question whether conditions existed requiring the regulation of the withdrawal of ground water from the appellants' wells (i.e., the question whether the underground water supply was sufficient for all users) was settled when the Director of Water Resources, pursuant to § 46-658, designated a control area encompassing appellants' nine wells. That designation effectively established that the underground water supply was insufficient for all owners using that supply. Furthermore, the record indicates that the order designating the control area was entered on August 1, 1977, and it is apparent no petition was filed seeking a review of that order within the 30 days specified by § 84-917. See *B. T. Energy Corp. v. Marcus*, 222 Neb. 207, [*306] 382 N.W.2d 616 (1986). [***13] Nor has the control area designation been modified pursuant to § 46-658(5). Thus, the question whether the underground water supply was insufficient for all water users was not an issue properly before

either the district court or URNRD at its February 11, 1992, hearing.

The appellants also assert that they are entitled to a ground water allocation greater than the 75-acre-inch 5-year allocation granted to all wells regulated by URNRD. Again, however, the time has passed to challenge that order. The record shows that URNRD adopted the 75-acre-inch order in January or February 1988, and the appellants apparently did not timely seek a review of that URNRD decision. Furthermore, the appellants do not contend and the record does not suggest that URNRD failed to comply with the notice and public hearing requirements of Neb. Rev. Stat. § 46-663.01 (Reissue 1988) when it adopted the 75-acre-inch allocation for the 5-year period ending December 31, 1992. The 75-acre-inch allocation having been previously adopted and not challenged, at its February 11 hearing URNRD was left to consider only whether the appellants' withdrawals of water had exceeded the allocated amount and whether a cease and [***14] desist order should therefore be issued. URNRD then determined that the appellants had exceeded their 75-acre-inch allocation, and in accordance with Neb. Rev. Stat. § 46-663(5) (Reissue 1988) and its own procedural rules, URNRD issued its cease and desist order.

The appellants next challenge the constitutionality of statutory provisions authorizing URNRD's issuance of a cease and desist order. In doing so, the appellants state that the Nebraska Ground Water Management and Protection Act is both vague and overbroad. See, also, *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). However, the argument which the appellants articulate presents only a vagueness question in the form of an assertion that the applicable statutory provisions are an unconstitutional delegation of legislative authority. As stated in *Kwik Shop v. City of Lincoln*, 243

Neb. 178, 182-83, 498 N.W.2d 102, 106 (1993):

It is axiomatic that statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. [*307] *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). [***15] Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution. See *id.* See, also, *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986). The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987).

When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement. *Kolender* [**649] *v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991). See, also, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). [***16] "In other words, due process requires that an enactment supply (1) a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited' and (2) 'explicit standards for those who apply [it].'" *ABC Books, Inc.*, 238 Neb. at 382, 470 N.W.2d at 764 (quoting *Grayned, supra*).

In re Application U-2, 226 Neb. 594, 413 N.W.2d 290 (1987), presented an issue similar to the issue raised by the appellants. The court stated:

Appellants . . . argue that § 46-226.01 is an unconstitutional delegation of legislative authority and that it does not contain adequate legal standards to govern the director's review of an application. We find no merit in this claim. We have held that where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, no unconstitutional delegation of legislative authority exists. *Mann v. Wayne County Board of Equalization*, 186 Neb. 752, 186 N.W.2d 729 (1971). Section § [sic] 46-226.02 sets out specific conditions which must be met before the director may approve an application [***17] . . . .

[*308] In addition, Neb. Rev. Stat. § 46-209 (Reissue 1984) gives DWR jurisdiction "over all matters pertaining to water rights for irrigation, power, or other useful purposes . . . ." The Legislature has recognized the expertise and experience needed to determine the difficult questions presented in the overall water situation in this state when it required, by Neb. Rev. Stat. § 46-701 (Reissue 1984), that the director of DWR be a professional engineer with at least 5 years' experience in a position of responsibility in irrigation work.

This court has recognized the difficulties inherent in requiring the Legislature to spell out each standard in complex fields in areas where expanding technology and complex theories daily change. In *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 465, 283 N.W.2d 12, 24 (1979), we stated:

"The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court should be reluctant to interfere with such discretion. Such standards [***18] in conferring discretionary power upon an administrative agency

must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations. . . . The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases."

Similarly, in *Anderson v. Tiemann*, 182 Neb. 393, 401-02, 155 N.W.2d 322, 328 (1976), we stated: "Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision."

In re Application U-2, 226 Neb. at 607-09, 413 N.W.2d at 299-300. [*309] We now turn to the statutory provisions bearing upon the issuance of the March 12 cease and desist order, first noting that with respect to the following quoted sections, § 46-657 provides requisite definitions. That section states:

As used [***19] in the Nebraska Ground Water Management and Protection
Act . . .

(6) District shall mean a natural resources district operating pursuant to Chapter 2, article 32;

(7) Director shall mean the Director of Water Resources; . . . .

(14) Board shall mean the board of directors of a district . . . .

Section 46-658, further, provides:

An area may be designated a control area by the director following a hearing initiated [**650] in accordance with subsection (3) of this section if it shall be determined, following evaluation of relevant hydrologic and water quality data, history of developments, and projection of effects of current and new development, that development and utilization of the ground water supply has caused or is likely to cause within the reasonably foreseeable future the existence of either of the following conditions:

(a) An inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply; or

(b) Dewatering of an aquifer, resulting in a deterioration of the quality of such ground water sufficient to make such ground water unsuitable for the present purposes for which it is being utilized.

(2) When determining whether to designate [***20] a control area because of the existence of any of the conditions listed in subsection (1) of this section, the director's considerations shall include, but not be limited to, whether conflicts between ground water users are occurring or may be reasonably anticipated or whether ground water users are experiencing or will experience within the foreseeable future substantial economic hardships as a direct result of current or anticipated [*310] ground water development or utilization.

(3) A hearing to designate a control area may be initiated by a district whenever it has information, sufficient in the opinion of the board of directors, to require that any portion of such district should be designated as a control area. . . .

(4)(a) Within thirty days after a hearing has been initiated

pursuant to subsection (3) of this section, the director shall consult with the district and fix a time and place for a public hearing to consider the information supplied and to hear any other evidence. . . .

(b) At the hearing, all interested persons shall be allowed to appear and present testimony. The Conservation and Survey Division of the University of Nebraska, the Nebraska Natural Resources Commission, [***21] and the Department of Environmental Control shall offer as evidence any information in their possession which they deem relevant to the purposes of the hearing. After the hearing and after any studies or investigations conducted by or on behalf of the director as he or she deems necessary, the director shall determine whether a control area shall be designated. If the director determines that no control area shall be established, he or she shall issue an order declaring that no control area shall be designated.

(c) If the director determines that a control area shall be established, he or she shall consult with such relevant state agencies named in subdivision (b) of this subsection and with the district or districts affected and determine the boundaries of the control area, taking into account the considerations enumerated in subsection (1) of this section, the effect on political subdivisions, and the socioeconomic and administrative factors directly affecting the ability to implement and carry out local ground water management, control, and protection.

In addition, § 46-666 states:

(1) A district in which a control area has been designated pursuant to subsection (1) of section [***22] 46-658 shall by order adopt one or more of the following controls for the

control area:

[*311] (a) It may determine the permissible total withdrawal of ground water for each day, month, or year and allocate such withdrawal among the ground water users;

. . . .

(2) In adopting, amending, or repealing any control authorized by subsection (1) of this section . . . the district's considerations shall include, but not be limited to, whether it reasonably appears that such action will mitigate or eliminate the condition which led to designation of the control or management area, will encourage a high degree of water use efficiency, or will improve the administration of the area.

(3) The adoption, amendment, or repeal of any authorized control in a control area shall be subject to the approval of the director. The director may hold a public [**651] hearing to consider testimony regarding the control prior to the issuance of an order approving or disapproving the adoption, amendment, or repeal of the control. . . . In approving the adoption, amendment, or repeal of an authorized control in a control area, the director's considerations shall include, but not be limited to, those enumerated in subsection [***23] (2) of this section.

. . . .

(5) If the district determines, following a public hearing conducted pursuant to section 46-665, that depletion or contamination of the ground water supply in the control area or any portion of the control area is so excessive that the public interest cannot be protected solely through implementation of reasonable controls adopted pursuant to subsection (1) of this section, it may, with the approval of the director, close all or a portion of the control area to the issuance of any additional permits for a period of one calendar year. Such

areas may be further closed thereafter by a similar procedure for additional one-year periods. . . .

Finally, § 46-663 states:

Regardless of whether or not any portion of a district has been designated as a control, management, or special ground water quality protection area, in order to administer and enforce the Nebraska Ground Water [*312] Management and Protection Act and to effectuate the policy of the state to conserve ground water resources, a district may:

. . . .

(5) Issue cease and desist orders, following ten days' notice to the person affected stating the contemplated action and in general the grounds for the [***24] action and following reasonable opportunity to be heard, to enforce any of the provisions of the act or of orders or permits issued pursuant to it, to initiate suits to enforce the provisions of orders issued pursuant to the act, and to restrain the construction of illegal wells or the withdrawal or use of water from such wells.

We find that the above-cited statutes provide adequate notice to citizens and adequate enforcement standards regarding the establishment of control areas, the adoption of rules to control water usage, and the issuance of cease and desist orders to prevent violations of such rules. As in *In re Application U-2*, 226 Neb. 594, 610, 413 N.W.2d 290, 301 (1987), the applicable statutory provisions "clearly outlined the legal field of battle and [are] not unconstitutional."

We finally address the appellants' contention that the issuance of a cease and desist order in this case is tantamount to a regulatory "taking," and their claim that the district court therefore erred in failing to award them compensation as a result of the issuance of the cease and desist order. With

respect to this issue, we point out that the issue [***25] of compensation was, in fact, not before the district court, since the appellants' petitions sought only a review of the action of URNRD in issuing the cease and desist order and an injunction which would have prevented the enforcement of that order. The appellants' petition did ask the district court to overturn URNRD's cease and desist order on the ground that the statute under which it was authorized and issued resulted in an unconstitutional taking of property without just compensation. In that regard, we note that there is no constitutional limitation on the right to take private property for public use under the power of eminent domain, except as to the right to just compensation. See *Hammer v. Department of Roads*, 175 Neb. 178, 120 N.W.2d [*313] 909 (1963). However, the appellants' petitions did not seek such compensation, and the appellants therefore failed to properly place that issue before the district court. In any event, however, the appellants' analysis fails to support their takings claim.

The appellants attempt to lay a foundation for their takings claim by citing language from *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985). [***26] In *Sorensen*, 221 Neb. at 191-92, 376 N.W.2d at 548, this court stated that "the right of an owner of overlying land to use ground water is an appurtenance constituting property protected by Neb. Const. art. I, | 21: 'The property of no person shall [**652] be taken or damaged for public use without just compensation therefor.'" However, ground water, as defined in | 46-657, is owned by the public, and the only right held by an overlying landowner is in the use of the ground water. *In re Application U-2, supra*. Furthermore, placing limitations upon withdrawals of ground water in times of shortage is a proper exercise of the State's police power. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

Quoting *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933), *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 705, 305 N.W.2d 614, 617 (1981), *rev'd on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982), [***27] recites Nebraska's common law of ground water: "The . . . rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . ."

Under this rule, when the underground water supply is sufficient for all users, a landowner is entitled to reasonable and beneficial use of that supply. Apparently with that in mind, the appellants point to language in *Prather v. Eisenmann*, 200 Neb. 1, 7, 261 N.W.2d 766, 770 (1978), stating: "Under the reasonable use doctrine, two neighboring landowners . . . can [*314] withdraw all the supply he [sic] can put to beneficial and reasonable use. What is reasonable is judged solely in relationship to the purpose of such use on the overlying land." The appellants then conclude that they were entitled to withdraw as much water as was required to use their [***28] land as they chose—in this case, to grow a corn crop.

The appellants' reliance on *Prather* is improvident, for the court specifically found that under the circumstances of that case, the water supply was sufficient for all users. Contrarily, as discussed previously, the designation of a control area which included the appellants' irrigated land established that in this instance the available supply of water was insufficient

for all users.

In addition, while the common-law rule for ground water was adopted in *Olson, supra*, the Legislature has the power to determine public policy with regard to ground water and can alter the common law governing the use of ground water. See *Sorensen, supra*. See, also, *Sporhase, supra*.

Finally, the appellants state that they were deprived of all economic use of their land during 1992 and argue that under *Lucas v. South Carolina Coastal Council*, U.S. , 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), they were therefore entitled to compensation. In *Lucas*, the Court found that a landowner was entitled [***29] to compensation because South Carolina's Coastal Zone Management Act prohibited all economically beneficial use of his land. However, the appellants' assertions in this instance are little more than a claim that because they could not withdraw enough water to grow a corn crop, they were therefore deprived of all economic use of their land. The record here fails to show that the appellants were, in fact, deprived of all economic use of their land in 1992, and, if only for that reason, *Lucas* is inapplicable under the circumstances presented here.

For the reasons stated in the opinion, the appeal in case No. 92-563 is dismissed as moot; the judgment in case No. S-92-562 is affirmed.

JUDGMENT IN NO. S-92-562 AFFIRMED.

APPEAL IN NO. S-92-563 DISMISSED.

APPENDIX B

IN THE DISTRICT COURT OF CHASE COUNTY, NEBRASKA

GREGORY L. BAMFORD & BAMFORD PARTNERSHIP, DAN ADLER and ROBIN ROTH,	)	Case No. 4996
Plaintiffs,	)	
vs.	)	Journal Entry
UPPER REPUBLICAN NATURAL RESOURCES DISTRICT, A BODY POLITIC,	)	
Defendant	)	

July 2, 1992, The Court having previously taken this matter under advisement makes the following findings and orders:

1. With regard to the Petition on appeal, filed by the Appellants and against Upper Republican Natural Resources District, the Court finds that the Petition on appeal should be and hereby is dismissed.

2. The Court further orders that the Appellants are enjoind [sic] from withdrawing ground water from wells located on the real estate listed in the Cease and Desist Orders issued herein by Appellees, until such times as the Appellants have been granted another allocation of ground water by the Appellee.

3. The Court further finds that that pursuant to Section 25-1916, Reissue Revised Statutes of Nebraska, a Supersedeas is not a matter of right, and the Court declines

in this particular case to set a Supersedeas.

4. The Court finds and orders that the Motion for Supersedeas, filed herein by the Appellants should be and hereby in overruled. Costs of the action are taxed to the Appellants. The Court bases the order entered herein on the following findings of fact:

A. That the Appellants herein had a valid pooling arrangement under the Rules and Regulations of the Appellees herein. That at all times material hereto of the pooling arrangement was in full force and effect and that the Board's action, wherein the pooling arrangement was dissolved, was set aside and held for naught at the specific request and instance of the Appellants, and therefore said pooling arrangement was in full force and effect.

B. That Appellee herein, the Upper Republican Natural Resources District, was established in 1972 and thereafter a Ground Water Control Area was established. That the real estate owned or operated by the Appellants was located in the Ground Water Control Area. That the Appellants at the time of the purchase of the real estate and the time of operating the wells in question herein on the real estate, were subject to the control of the Upper Republican Resources District, and in fact the Appellants, through their representative, Gregory L. Bamford, have attended meetings of the Upper Republican NRD, have discussed water allocations, and have made their position known to the Appellee with regard to allocations of water on many and numerous occasions.

C. That the Appellants herein knew of the allocation of water pursuant to Rule 5 of the Rules and Regulations for ground water control of the Upper Republican NRD, and know of and were informed of Rule 12 of the Rules and Regulations for ground water control of the Upper Republican NRD, and that the Appellants knew of these regulations prior to and at the time of the purchase of the real estate involved herein in the years 1980 and 1981.

D. That the evidence is without q uestion [sic] that the Appellants herein have over-used the allocations granted to them under Rule 5 of the Rules & Regulations for ground water control of the Upper Republican NRD Control Area. That said over-use occurred in the fourth year of the five-year allocation, and that Appellants made a conscious, economic decision to place enough irrigation water on their crops to grow what they considered to be a commercially reasonable crop, and that decision is what resulted in their over-use of the allocation for the five-year period commencing in 1988 and ending at the end of 1992.

E. As defined in the Statutes of the State of Nebraska, specifically Section 46-657, and specifically as defined in the Rules and Regulations for Ground Water Control of the Upper Republican NRD Control Area, dated April 15, 1991, the Appellants were operating an illegal well, in that their well was being operated in violation of the regulations, and in violation of Section 46-657, Subparagraph 8(B).

F. The Court specifically finds with regard to the Petition on Appeal, that although the Appellants have the right to use ground water underlying real estate owned and leased by the Appellants, that the right to use water located under the real estate owned and operated by the Appellants is subject to the provisions of Chapter 46, Article 6, and the correlative rights of other landowners when the ground water supply is insufficient for all users.

G. The Court specifically finds that the Appellants knew of the Groundwater Management and Protection Act and the Rules and Regulations of the Upper Republican NRD Control Area at the time they purchased the real estate, and that said real estate and water underlying was subject to the Nebraska Groundwater Management and Protection Act.

H. The Court further finds that Section 46-663 and 46-664 of the Nebraska Statutes, and specifically that the Nebraska Groundwater Management and Protection Act is

constitutional, that it does not deprive the Appellants of a property right without due process of law, and without just compensation, because of the fact that water in the State of Nebraska is owned by the citizens of the State and the right of the owner of overlying land to use ground water is a limited property right, and as such, is subject to reasonable regulation for the benefit of all citizens.

I. That the evidence is overwhelming, and in fact agreed to by the Appellants, that they have over-used their allocation of water under the Rules and Regulations for Ground Water Control of the Upper Republican NRD Control Area, and in fact the evidence is overwhelming that the Cease and Desist Order of March 12, 1992, is supported by substantial competent material evidence, which evidence is in fact agreed to by the Appellants.

J. That the Order of March 12, 1992, to cease and desist operation of the wells on real estate owned or operated by the Appellants is issued only after due process notice, and hearing before the Board of Directors of the Upper Republican Resources District Control Area, and said order is not arbitrary and capricious, but is in fact the only order under the circumstances that could or should have been entered.. [sic]

K. That Section 46-666(4) of the Reissue Revised Statutes of Nebraska is not mandatory, and does not require that the Appellee in this case determine different water allocations by reasons of different water allocations by reason of different soil types or soil conditions, but only indicates that if because of varying ground water uses, different irrigation distribution systems, or varying climatic, [sic] hydrological, or soil conditions exist within a control area, the uniform application throughout such area of one or more controls would fail to carry out the intent of the Nebraska Groundwater Management and Protection Act in a reasonably effective and equitable manner, the controls may contain different water allocations. In fact, the evidence shows that the Appellants' land is

very similar to, if not the same as, most of the other land located in the area under the control of the Upper Republican NRD Control Area. For the reasons cited herein, the Court Order is as previously set out.

_____

District Judge

APPENDIX C

STATE OF NEBRASKA

UPPER REPUBLICAN NATURAL RESOURCES DISTRICT

IN THE MATTER OF THE COMPLAINT
CEASE AND DESIST ORDER
Case No._____

AGAINST GREGORY L. BAMFORD,
BAMFORD PARTNERSHIP, DAN
ADLER AND ROBIN ROTH

Now on this 12th day of March, 1992, pursuant to the Statutes of the State of Nebraska, and the Rules and Regulations of the Upper Republican Natural Resources District you are hereby ordered to cease and desist from:

Withdrawing groundwater from any irrigation well located on the following described real estate:

Township 3 North, Range 42 West of the 6th P.M.
Section 13: SW1/4
Section 23: NW1/4 and S1/2
Section 24: NW1/4
Dundy County, Nebraska,

and also the following described real estte [sic], if pooled with that described directly above:

Township 4 North, Range 41 West of the 6th P.M.
Section 20: E1/2
Section 28: NW1/4
Section 29: NW1/4
Dundy County, Nebraska

You are hereby further notified that you may file within seven (7) days, a PLAN FOR AND SCHEDULE OF COMPLIANCE outlining the method by which you intend to comply with the Order. The PLAN must be filed at the District Office at 135 West 5th Street, Imperial, Nebraska 69033.

Failure to file the PLAN, or failure to fulfill the terms of a filed PLAN, shall be cause for the District to seek an injunction against you in District Court.

Appeal from this Order is governed by the Administrative Procedure Act, Section 84-901, et. [sic] seq. R.R.S. and must be taken within 30 days after service of this Order upon you.

UPPER REPUBLICAN NATURAL RESOURCES DISTRICT

BY _____

Donn Gengenbach, Chairman

APPENDIX D

CHAPTER 46 IRRIGATION AND REGULATION OF WATER
ARTICLE 6 GROUND WATER
(f) NEBRASKA GROUND WATER MANAGEMENT AND PROTECTION ACT

R.R.S. Neb. 146-656 (1993)

46-656. Declaration of intent and purpose

The Legislature finds that ground water is one of the most valuable natural resources in the state and that an adequate supply of ground water is essential to the general welfare of the citizens of this state and to the present and future development of agriculture in the state. The Legislature recognizes its duty to define broad policy goals concerning the utilization and management of ground water and to ensure local implementation of those goals. Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the correlative rights of other landowners when the ground water supply is insufficient for all users. The Legislature determines that the goal shall be to extend ground water reservoir life to the greatest extent practicable consistent with beneficial use of the ground water and best management practices.

The Legislature further recognizes and declares that the management, protection, and conservation of ground water and the beneficial use thereof are essential to the economic prosperity and future well-being of the state and that the public interest demands procedures for the implementation of

management practices to conserve and protect ground water supplies and to prevent the contamination or inefficient or improper use thereof. The Legislature recognizes the need to provide for orderly management systems in areas where management of ground water is necessary to achieve locally determined ground water reservoir life goals and where available data, evidence, or other information indicates that present or potential ground water conditions, including subirrigation conditions, require the designation of areas with special regulation of development and use.

Nothing in the Nebraska Ground Water Management and Protection Act relating to the contamination of ground water is intended to limit the powers of the Department of Environmental Quality provided in Chapter 81, article 15.

R.R.S. Neb. | 46-657

46-657. Terms, defined

For purposes of the Nebraska Ground Water Management and Protection Act and sections 46-601 to 46-613.02 and 46-636 to 46-655, unless the context otherwise equires:

(1) Person shall mean a natural person, a partnership, a limited liability company, an association, a corporation, a municipality, an irrigation district, an agency or a political subdivision of the state, or a department, and agency, or a bureau of the United States;

(2) Ground water shall mean that water which occurs in or moves, seeps, filters, or percolates through ground under the surface of the land;

(3) Contamination or contamination of ground water shall mean nitrate nitrogen or other material which enters the ground water due to action of any person and causes degradation of the quality of ground water sufficient to make such ground water unsuitable for present or reasonably foreseeable beneficial
uses;

(4) District shall mean a natural resources district operating pursuant to Chapter 2, article 32;

(5) Director shall mean the Director of Water Resources;

(6) Illegal water well shall mean (a) any water well operated or constructed without or in violation of a permit required by the act, (b) any water well not in compliance with rules and regulations adopted and promulgated pursuant to the act, (c) any water well not properly registered in accordance with sections 46-602 to 46-604, or (d) any water well not in compliance with any other applicable laws of the State of Nebraska or with rules and regulations adopted and promulgated pursuant to such laws;

(7) Control area shall mean any area so designated by the director following a public hearing initiated and conducted pursuant to section 46-658;

(8) To commence construction of a water well shall mean the beginning of the boring, drilling, jetting, digging, or excavating of the actual water well from which ground water is to be withdrawn;

(9) Management area shall mean any area so designated by a district pursuant to sections 46-673.01 to 46-673.06;

(10) Ground water reservoir life goal shall mean the finite or infinite period of time which a district establishes as its goal for maintenance of the supply and quality of water in a ground water reservoir at the time a ground water management plan is adopted;

(11) Board shall mean the board of directors of a district;

(12) Irrigated acre shall mean any acre that is certified as such pursuant to rules and regulations of the district and that is actually capable of being supplied water through irrigation works, mechanisms, or facilities existing at the time of the allocation;

(13) Acre-inch shall mean the amount of water necessary to cover an acre of land one inch deep;

(14) Subirrigation or subirrigated land shall mean the natural occurrence of a ground water table within the root zone of agricultural vegetation, not exceeding ten feet below the surface of the ground;

(15) Best management practices shall mean schedules of activities, maintenance procedures, and other management practices utilized to prevent or reduce present and future contamination of ground water which may include irrigation scheduling, proper timing of fertilizer and pesticide application, and other fertilizer and pesticide management programs;

(16) Special ground water quality protection area shall mean any area designated as such by the Director of Environmental Quality following a public hearing, with boundaries approved by the Director of Environmental Quality, in which contamination of ground water is occurring or is likely to occur in the reasonably foreseeable future;

(17) Point source shall mean any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, vessel, other floating craft, or other conveyance, over which the Department of Environmental Quality has regulatory authority and from which a substance which can cause or contribute to contamination of ground water is or may be discharged;

(18) Allocation shall mean the allotment of a specified total number of acre-inches of irrigation water per irrigated acre per year or an average number of acre-inches of irrigation water per irrigated acre over any reasonable period of time not to exceed five years;

(19) Rotation shall mean a recurring series of use and nonuse of irrigation wells on an hourly, daily, weekly, or monthly basis or of irrigated acres on an annual basis; and

(20) Water well shall have the same meaning as in section 46-601.01.

R.R.S. Neb. § 46-658

46-658. Control area; how determined; considerations; hearing; initiated by district; when held; notice; determination by director; order designating control area; modification of control area boundaries; procedure

(1) An area may be designated a control area by the director following a hearing initiated in accordance with subsection (3) of this section if it is determined, following evaluation of relevant hydrologic and water quality data, history of developments, and projection of effects of current and new devel-

opment, that development and utilization of the ground water supply has caused or is likely to cause within the reasonably foreseeable future the existence of either of the following conditions:

(a) An inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply; or

(b) Dewatering of an aquifer, resulting in a deterioration of the quality of such ground water sufficient to make such ground water unsuitable for the present purposes for which it is being utilized.

(2) When determining whether to designate a control area because of the existence of any of the conditions listed in subsection (1) of this section, the director's considerations shall include, but not be limited to, whether conflicts between ground water users are occurring or may be reasonably anticipated or whether ground water users are experiencing or will experience within the foreseeable future substantial economic hardships as a direct result of current or anticipated ground water development or utilization.

(3) A hearing to designate a control area may be initiated by a district whenever it has information sufficient in the opinion of the board to require that any portion of such district should be designated as a control area. The board shall report such information to the director with a request that a hearing be held to determine if a control area should be established. The request shall be accompanied by a general description of the area proposed for inclusion in such control area.

(4)(a) Within thirty days after a hearing has been initiated

pursuant to subsection (3) of this section, the director shall consult with the district and fix a time and place for a public hearing to consider the information supplied and to hear any other evidence. The hearing shall be held within one hundred twenty days after it has been initiated, shall be open to the public, and shall be located within or in reasonable proximity to the area proposed for designation as a control area. If, from information submitted by the district or otherwise available to the director, the director has reason to believe that area other than that identified by the district should be considered for inclusion in any control area which would be established as a result of such request, he or she shall so notify the district or districts whose boundaries encompass such additional area. Notice of the hearing shall be published at the expense of the district or districts in such newspapers as are necessary to provide for general circulation within the geographic area at least once each week for three consecutive weeks, the last publication to be not less than seven days prior to the hearing. The notice shall provide a general description of all area which will be considered by the director for inclusion in the control area.

(b) At the hearing, all interested persons shall be allowed to appear and present testimony. The Conservation and Survey Division of the University of Nebraska, the Nebraska Natural Resources Commission, and the Department of Environmental Quality shall offer as evidence any information in their possession which they deem relevant to the purposes of the hearing. After the hearing and after any studies or investigations conducted by or on behalf of the director as he or she deems necessary, the director shall determine whether a control area shall be designated. If the director determines that no control area shall be established, he or she shall issue an order declaring that no control area shall be designated.

(c) If the director determines that a control area shall be established, he or she shall consult with such relevant state agencies named in subdivision (b) of this subsection and with the district or districts affected and determine the boundaries of the control area, taking into account the considerations enumerated in subsection (1) of this section, the effect on political subdivisions, and the socioeconomic and administrative factors directly affecting the ability to implement and carry out local ground water management, control, and protection.

(d) If the director determines that contiguous area within the jurisdictional limits of one or more districts other than the district or districts which initiated the hearing is subject to the conditions identified in this section and therefor appropriate for inclusion in such control area, he or she shall so notify such other district or districts prior to issuance of the order designating the control area.

(e) When the boundaries of a control area have been determined, the director shall issue an order designating the area as a control area. Such an order shall include a geographic and a stratigraphic definition of the control area. Notice of the order shall be provided in the same manner as that provided for the hearing.

(5) Modification in control area boundaries or dissolution of a control area may be accomplished utilizing the procedure established in this section for the initial designation of such areas as control areas, but hearings for designation, modification, or dissolution of such control area may not be initiated more often than once a year.

R.R.S. Neb. § 46-665

46-665, Natural resource district, conduct meetings to determine controls; hearings; when; public notice

(1) Following the designation of any area as a control area and at such other times as the district desires the adoption, amendment, or repeal of any control authorized by section 46-666, the district shall hold a public meeting to determine the type of controls to be imposed within the control area.

(2) Prior to the adoption, amendment, or repeal of any authorized control, the district shall hold one or more public hearings to consider testimony regarding such adoption, amendment, or repeal. The text of the control proposal for adoption or repeal of the amendment shall be mad available to the public at least thirty days prior to any such hearing. The hearings shall be held within or in reasonable proximity to the control area. Public notice of the time and place of all such hearings shall be given in the manner provided in section 46-658.

(3) At the hearing, all interested persons shall be allowed to appear and present testimony. The Conservation and Survey Division of the University of Nebraska, the Nebraska Natural Resources Commission, and the Department of Environmental Quality shall offer as evidence any information in their possession which they deem relevant to the purposes of the hearing.

R.R.S. Neb § 46-666

46-666. Natural resources district; adopt one or more controls; uniformity, exception; restrict insurance of permits;

publication of orders; joint exercise of authority between districts; failure of district to adopt controls; powers and duties of director; information to be supplied to director

(1) A district in which a control area has been designated pursuant to subsection (1) of section 46-658 shall by order adopt one or more of the following controls for the control area:

(a) It may determine the permissible total withdrawal of ground water for each day, month, or year and allocate such withdrawal among the ground water users;

(b) It may adopt a system of rotation for the use of ground water;

(c) It may adopt well-spacing requirements more restrictive than those found in sections 46-609 and 46-651;

(d) It may require the installation of devices for measuring ground water withdrawals from water wells; and

(e) It may adopt and promulgate such other reasonable rules and regulations as are necessary to carry out the purpose for which a control area was designated.

(2) In adopting, amending, or repealing any control authorized by subsection (1) of this section or sections 46-673.08 to 46-673.12, the district's consideration shall include, but not be limited to, whether it reasonably appears that such action will mitigate or eliminate the condition which led to designation of the control area or management area, will encourage a high degree of water use efficiency, or will improve the administration of the area.

(3) the adoption, amendment, or repeal of any authorized control in a control area shall be subject to the approval of the director. The director may hold a public hearing to consider testimony regarding the control prior to the issuance of an order approving the adoption, amendment, or repeal of the control. The director shall consult with the district and fix a time, place, and date for such hearing. In approving the adoption, amendment, or repeal of an authorized control in a control area, the director's consideration shall include, but not be limited to, those enumerated in subsection (2) of this section.

(4) If because of varying ground water uses, different irrigation distribution systems, or varying climatic, hydraulic, geologic, or soil conditions existing within a control area or management area the uniform Application throughout such area of one or more controls would fail to carry out the intent of the Nebraska Ground Water Management and Production Act in a reasonably effective and equitable manner, the controls adopted by a district pursuant of subsection (1) of this section or sections 46-673.08 to 46-673.12 may contain different water allocations for different irrigation distribution systems, on the condition that such different water allocations shall be authorized for no more than five years from the time such allocations are adopted, and different provisions for different categories of ground water use or portions of the control area or management area. Any difference in such provisions shall recognize and be directed towards such varying ground water uses, distribution irrigation systems, or varying conditions. The provision of all controls for different categories of ground water use shall be uniform for all portions of the area which have substantially similar climatic, hydraulic. geologic, and soil conditions.

(5) If the district determines, following a public hearing

conducted pursuant to section 46-665, that depletion or contamination of the ground water supply in the control area or any portion of the control area is so excessive that the public interest cannot be protected solely through implementation of reasonable controls adopted pursuant to subsection (1) of this section, it may, with the approval of the director, close all or a portion of the control area to the issuance of any additional permits for a period of one calendar year. Such areas may be further closed thereafter by a similar procedure for additional one-year periods. Any such area may be reopened at any time the district determines that conditions warrant new permits at which time the district shall consider all previously submitted applications for permits in the order in which they were received.

(6) The district shall cause a copy of each order adopted pursuant to this section or sections 46-673.08 to 46-673.12 to be published once each week for three consecutive weeks in a local newspaper published or of general circulation in the area involved, the last publication of which shall be not less than ten days prior to the date set for the effective date of such order.

(7) Whenever a control area or management area encompasses portions of two or more districts, the responsibilities and authorities delegated to this section and sections 46-665 to 46-673.12 shall be exercised jointly and uniformly by agreement of the respective boards of all districts so affected.

(8) If at the end of eighteen months following the designation of a control area pursuant to section 46-658 a district encompassed in whole or in part by a control area has not adopted any specific controls pursuant to subsection (1) of this section, the power to specify controls shall vest in the director who shall, within ninety days after the end of the

eighteen months, adopt and promulgate by rules and regulation such controls as he or she deems necessary for carrying out the intent of the Nebraska Ground Water Management and Protection Act. Subject to section 46-667, the enforcement of controls adopted pursuant to this section shall be the responsibility of the district involved. When the controls adopted by the director pursuant to this subsection are in effect in a district, all application fees for water well permits in such district pursuant to section 46-659 shall be payable to the director.

(9) If the power to adopt controls in a control area is vested in the director, he or she shall be provided with a copy of all information, testimony, and data available to the district or districts as a result of the public hearing for the adoption of controls. At his or her discretion, the director may conduct one or more additional public hearings prior to making his or her determination or selection of controls. Notice of any such additional hearings shall be given in the manner provided in section 46-658.

R.R.S. Neb. § 46-673.03

The director shall review any ground water management plan submitted by a district to ensure that the best available subsidies, data, and information were utilized and considered and that such plan is supported by and is a reasonable application of such information. If the primary purpose of the proposed management area is protection of water quality, the director shall consult with the department of Environmental Quality regarding approval or denial of the management plan. the director shall consult the Conservation and Survey Division of the University of Nebraska, the Nebraska Natural Resources commission, and such other state or federal agen-

cies the director shall deem necessary when reviewing plans. Within ninety days after receipt of the plan, the director shall transmit his or her findings, conclusions, and reasons for approval or disapproval to the district submitting the plan.

R.R.S. Neb. | 46-673.10

46-673.10. Ground water allocation; limitations and conditions

(1) If allocation is adopted for use of ground water for irrigation purposes in a management area, the permissible withdrawal of ground water shall be allocated equally per irrigated acre. Such allocation shall specify the total number of acre-inches that are allocated per irrigated acre per year, except that the district may allow a ground water user to average his or her allocation over any reasonable period of time not to exceed five years. A ground water user may use his or her allocation on all or any part of the irrigated acres to which the allocation applies.

(2) A ground water user in a management area shall not be prevented from increasing the number of acres which he or she irrigates, or otherwise adding new or additional acres or uses of ground water, but all such new or additional acres or uses shall be subject to the controls adopted pursuant to sections 46-656 to 46-674. A person who increases the number of acres which he or she irrigates, or otherwise adds new or additional uses of ground water, shall be entitled to the same allocation as existing acres or uses.

(3) If annual rotation or reduction of irrigated acres is adopted for use of ground water for irrigation purposes in a

management area, the nonuse of irrigated acres shall be a uniform percentage reduction of each landowner's irrigated acres within the management area or a subarea of the management area. Such uniform reduction may be adjusted for each landowner based upon crops grown on his or her land to reflect the varying consumptive requirements between crops.

RULES AND REGULATIONS FOR GROUNDWATER CONTROL OF THE UPPER REPUBLICAN NATURAL RESOURCES DISTRICT CONTROL AREA ADOPTED APRIL 15, 1991

RULE 5(a)(1)

a. Each irrigated acre within an irrigated tract is hereby granted an allocation of 75 acre inches for the period commencing January 1, 1988 and terminating December 31, 1992 as follows:

In accordance with the following provisions:

(1) The allocation of 75 acre inches per irrigated acre shall be designated the "basic allocation".

(2)

FILED

AUG 2 5 1994

OFFICE OF THE CLERK

No. 94-0177

In The

Supreme Court of the United States

October Term, 1994

GREGORY L. BAMFORD, an Individual, and BAMFORD PARTNERSHIP, a Colorado Partnership,

Petitioners,

v.

UPPER REPUBLICAN NATURAL RESOURCES DISTRICT, a Body Politic,

Respondent.

Petition For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF IN OPPOSITION

TERRY E. SAVAGE
420 Broadway
Box 459
Imperial, NE 69033
(308) 882-4348
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent must address Petitioners' No. 3 "Question Presented". That question is better stated:

Whether a governmental subdivision, charged by law to administer a statutory scheme designed to conserve by regulation a valuable natural resource, may include in its regulations a provision requiring users of the resource to consume a specific amount of the resource during a specific time period. And, further, whether once said user has expended its allocation, may the governmental subdivision require the user to cease using the resource pending the granting of another allocation of the resource to the user.

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STATEMENT OF THE CASE

This case involves only the question of whether a state, which has never recognized ground water as anything other than public property, may exercise control over that ground water, lying entirely within its own boundaries, by a system of allocations to users thereof. The system provides that ground water users may pump and consume a specific amount of water over or during a specific time period [in this case 75 acre inches per irrigated acre over 5 years] and further provides for cessation of use when the allocation is exhausted or exceeded.

A key factor in the case below, which Petitioners fail to mention in their brief, is the collateral nature of their attack. Petitioners appealed timely only the order of cessation. The two governmental actions which aggrieve them the most, however, occurred in 1977 when a ground water shortage was determined and declared; and in 1988 when they received their last allocation of ground water, which they maintain was inadequate. The statute of limitation on such actions in Nebraska is 30 days.

SUMMARY OF THE ARGUMENT

A. No Taking Has Occurred.

Petitioners admit in their brief that all irrigators with Respondent's jurisdiction received the same allocation of ground water. Petitioners further admit that they "had used all the water allotted to them for the five year allocation period". [Petitioners Brief, page 10]. In fact,

Petitioners had overdrawn their allocation by 12.79 acre inches.

B. The Nature of the Property Allegedly Taken.

Article XV, Section 4 of the Nebraska Constitution declares water for domestic and irrigation purposes to be a natural want. The following Section 5, dedicates the water of every natural stream to the people for beneficial purposes. Ground water has been held to be included in these constitutional provisions. In Nebraska, ground water is not appropriated; the owner of lands overlying the aquifer have only a right to use the ground water on that land for beneficial purposes. Ground water is owned and dedicated to the public, not to private citizens.

C. Eminent Domain Protection Does Not Extend to this Case.

In Nebraska, as stated above, there are constitutional as well as statutory provisions stating that water is the property of the public. The "taking" theory as it pertains to ground water has been rejected in at least two instances where such provisions exist. *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 630 P.2d 1164 (1981) and *Pratt v. State Dept. of Natural Resources*, 309 N.W.2d 767 (Minn. 1981). See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981) in which this Court lent support to the argument that the "taking" protections do not apply where a property right is expressly conditioned on the right of the government to abridge the right, as is the case in Nebraska.

D. Petitioners' Attack is Collateral and an Attempt to Circumvent the Statute of Limitations.

Petitioners' appeal was timely only as it pertains to the cease and desist order issued by the Appellee on March 12, 1992. The designation of the territory encompassing Petitioners' lands as a control area and the adoption of the various rules and regulations of the Respondent, particularly as to the amount of groundwater allocation, were final orders at a much earlier time. Any attempt to review those matters is barred by the statute of limitations set forth in the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920, 1943 (Reissue of 1987). Thirty (30) days after service of the final decision is the only appeal time provided by that Act, or any other provision of law.

ARGUMENT

A. No Taking Has Occurred.

Petitioners appear to rely heavily on two recent decisions of this Court. *Dolan v. City of Tigard*, No. 93-518, slip op. (U.S. June 24, 1994), and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992). Both these cases are clearly distinguishable from this case for the reason that Mrs. Dolan and Mr. Lucas were required to give up their property for the perceived public good or welfare without compensation. Petitioners have given up nothing. In fact, at the time they were ordered to stop withdrawing ground water until they received another allocation, they had used 12.79 acre inches per irrigated

acre over their allocation. Petitioners, it is obvious from the record herein, had simply chosen to use their water over a shorter period of time. Nothing has been seized; their land is inviolate; they used considerably more water to raise crops during the first four years of the allocation period than other farmers in the area. They had every opportunity to make productive economic use of their land during 1992 by dry cropping or by availing themselves of United States Department of Agriculture farm program provisions (such as 0-92). They simply chose not to do so.

Petitioners complain that "government must quantify the nature and extent of a ground water shortage and particularize those findings with regard to a specific property owner before taking the owner's right to use ground water." This assertion, were it valid, ignores the record in this case. Extensive modeling of the ground water aquifer and continuous monitoring and measuring of the same throughout the control area, including Petitioners' farm, have occurred. Every year, as required by law, since establishment of the control area Respondent has held public information meetings to disseminate all available hydrologic data pertaining to the control area and it also conducts a public hearing each January at which all ground water users, and others, are invited and urged to participate so that meaningful and effective rules governing ground water use may be adopted, modified or rescinded. Each year a new set of rules, based on the evidence presented at that hearing, is adopted, retained or modified by an order of Respondent which must be approved by the Nebraska Director of Water Resources. Petitioners have never appealed from any such order.

B. The Nature of the Property Allegedly Taken.

In order to address the allegation that an unconstitutional "taking" has occurred, it is necessary to determine the nature of the alleged right taken. Nebraska law pertaining to ground water is well developed. It is clear from an examination of that body of law that Respondent's actions are legal and proper in all respects, and that Petitioners have no "property right" subject to being taken.

The Nebraska Legislature has found ground water to be "one of the most valuable natural resources in the state". Neb. Rev. Stat. § 46-656, 1943 (Reissue of 1988).

The Nebraska Ground Water Management and Protection Act, the law under which Petitioner has taken all its actions relevant to this case, is actually a codification of ground water law in Nebraska from the passage of its Constitution in 1875 to the present time.

In Nebraska ground water is not appropriated; the owner of lands overlying the aquifer have only a right to use the ground water on that land for beneficial purposes. Ground water is owned and dedicated to the public, not to private citizens.

Nebraska has adopted and historically followed the American rule of ground water use. In *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933) the rule is stated as:

> The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and

> beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the water, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.

As stated above, the Nebraska Ground Water Management and Protection Act is the law of this State regarding ground water property rights and use rights. Each land owner has only a right to use the water under his land subject to the Act. The Act authorizes and empowers Natural Resources Districts to establish controls, including allocations.

Sorensen v. Lower Niobrara NRD, 221 Neb. 180, 376 N.W.2d 539 (1985), a case cited by Petitioners, deals with damages to a landowner actually deprived of ground water. In that case the Nebraska Court was dealing with the Municipal and Rural Domestic Ground Water Transfers Act, Neb. Rev. Stat. §§ 46-638 to 46-650, 1943 (Reissue of 1988). In that case ground water was sought to be pumped and removed from privately owned lands. The Sorensens were to be actually deprived of the water, it was to be pumped to the surface and transferred off their land and provided to others.

In this case the right to beneficial use is the keystone, and that right has never been accorded the status of a private property right. In fact, it has uniformly been subjected to the public's right to limit usage based on the public's actual ownership of the water. The *Sorensen* court acknowledges:

1. The public may limit or deny the right of private parties to freely use the water, and

2. Ground water use is not an unlimited private property right in Nebraska law. (*Id.* at 190, Nebraska).

C. Eminent Domain Protection Does Not Extend To This Case.

This Court, in dicta, has reviewed and approved the governmental actions complained of by Petitioners. *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), dealt with a well within the subject control area located on the extreme west boundary of Chase County, Nebraska. In that case the Nebraska Supreme Court reiterated the rule of correlative sharing set out herein. The case was appealed to this Court and part of Neb. Rev. Stat. § 46-613.01, 1943 (Reissue of 1988) was held unconstitutional. That constitutionally defective statute dealt with the transter of water from the well into the State of Colorado without a permit from Nebraska. This Court held that such a requirement by Nebraska violated the Commerce Clause of the Federal Constitution and remanded the case back to the Nebraska Supreme Court to sever the objectionable part of the offending statute. *Sporhase v. Nebraska*, 102 S.Ct. 346, 73 L.Ed.2d 1254 (1982).

The original *Sporhase* case, however, in holdings not disturbed on the appeal, states:

1. Nebraska recognizes only a narrowly circumscribed right of reasonable use of ground water on overlying lands, not an ownership right,

2. The Legislature has the power to determine public policy with regard to ground water, and most importantly,

3. The public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake. That determination was lawfully made by the Director of Water Resources on August 1, 1977 when the control area was established.

In the case after remand, *State ex rel. Douglas v. Sporhase*, 213 Neb. 484, 329 N.W.2d 855 (1983) the Nebraska court removed the reciprocity requirement as directed by this Court. That Court, however, pointed out that the Supreme Court:

> did not declare illegal the statutory scheme for conservation and preservation of ground water. Rather, on a variety of theories, *the [Supreme] Court approved the general scheme*, e.g., "unexercised federal regulatory power" and "measures taken by a State to conserve and preserve for its own citizens this vital resource in time of severe shortage." *Id.* at 485. (Emphasis supplied.)

The "taking" or inverse condemnation theory regarding water use or rights has been addressed in several other jurisdictions. In *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981) the Arizona Supreme Court rejected a "taking" challenge by ground water users to the Arizona Ground Water Management Act of 1980 on the basis that ground water users did not own ground water until they pumped it up for use and that users were thus not deprived of property.

In some states, as in Nebraska, there are constitutional and statutory provisions stating that water is the property of the public. The "taking" theory has been

rejected in at least two instances where such provisions exist. *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 630 P.2d 1164 (1981) and *Pratt v. State Dept. of Natural Resources*, 309 N.W.2d 767 (Minn. 1981). See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981) in which the Supreme Court lent support to the argument that the "taking" protections do not apply where a property right is expressly conditioned on the right of the government to abridge the right, as is the case in Nebraska.

D. Petitioners' Attack is Primarily Collateral and an Attempt to Circumvent the Statute of Limitations.

This appeal, at all its stages, is timely only as it pertains to the cease and desist order issued by the Respondent on March 12, 1992. The designation of the territory encompassing Petitioners' lands as a control area and the adoption of the various rules and regulations of the Respondent, particularly as to the amount of groundwater allocation, were final orders in 1977 and 1988, respectively. Any attempt to review those matters is barred by the statute of limitations set forth in the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-902 to 84-920, 1943 (Reissue of 1987). Thirty (30) days after service of the final decision is the only appeal time provided by that Act.

According to Neb. Rev. Stat. § 84-917 (1990 CUMM. SUPP), the Petitioners can only have review, on the record made at the formal adjudicatory hearing (Exhibits 5 aka 7, 5A aka 7A, 5B aka 7B) on the following grounds:

1. That the action is a violation of constitutional provisions. This means a violation of Petitioners' constitutional rights pertaining to the issuance of the cease and desist order, not a review of the previous actions of the Director of Water Resources and Respondent in its rule-making capacity. Again, those matters are not timely in this case and review is barred by the statute of limitations.

2. That the action is in excess of the statutory authority, or jurisdiction of the Respondent. There have not been any allegations or pleadings suggesting a lack of jurisdiction of the Respondent. The authority of Respondent is vested in it by two statutes, Neb. Rev. Stat. §§ 46-663 and 46-666, 1943 (Reissue of 1988). Section 46-663 empowers the Respondent to:

a. Adopt and promulgate rules and regulations necessary to discharge its administrative duties. The primary rules pertaining to this function are Rules 11 and 12 of the District and appear in Order No. 14, which is part of the record.

b. Issue cease and desist orders to enforce any of the provisions of the act or of orders issued pursuant to it, and to initiate suits to enforce the provisions of orders issued pursuant to the act. Paragraph b., immediately preceding, appears as paragraph (5) of the statute cited. It is very important to this case. Cease and desist orders carry a clear message; stop! The legislative mandate to stop those not conserving ground water could not be more clear. The Respondent has done nothing more, or

nothing less, than fulfill the very function given to it by the Nebraska legislature.

CONCLUSION

In 1977, after extensive scientific investigation and a public hearing process the Nebraska Director of Water Resources found the supply of ground water in the control area to be inadequate. Fifteen years ago the Respondent began allocating ground water within its jurisdiction. In 1988 the Petitioners, who had received allocations for earlier periods, received 75 acre inches per irrigated acre for the crop years 1988 to 1992, as did every other irrigator in the control area. They used it all, and then some, and were not allowed to irrigate during 1992.

The next year Petitioners were entitled to, and did receive a new allocation, less their overdraw. They have received the same allocation as all other irrigators in the control area who have operated the same length of time as they have.

Petitioners' claim of constitutional deprivation are totally without merit. This case presents no substantial federal question. It deals with a completely local issue and is actually moot at this time.

The petition for writ of certiorari should be denied.

Respectfully submitted,

Upper Republican Natural
Resources District,
Respondent,
TERRY E. SAVAGE, Its Attorney
420 Broadway
Box 459
Imperial, Ne. 69033
(308) 882-4348
Counsel of Record